

## ARTICLE

**Private Parts: An Interrogation of Private Property Rights in Cadaveric Organs**

CHRISTOPHER SMOL\*

This paper makes a tentative case for a futures sales model for cadaveric donor organs, wherein individuals can contract out the right to harvest their organs for transplant following their death, in exchange for compensation. The law of the United Kingdom, New Zealand, Australia and the United States are generally adverse to the notion of property rights in human bodily materials, and this article criticises this paradigm as serving to disenfranchise materials' originators. New Zealand's framework for cadaveric donation under the Human Tissue Act 2008 does not fully address practical barriers to successful donations. This article advocates a tightly-regulated government-run futures scheme as having potential to overcome some of these barriers, while mitigating serious ethical concerns. Non-instrumental concerns around commerce in the human body can be reconciled with the proposed model.

**I Introduction**

Almost all jurisdictions agree that human organs should not be able to be bought and sold. Similarly, most agree that an increase in the supply of organs available for potentially life-saving transplantations is desirable. However, the former position, as reified in the legal principle that there is *no property in the body*, has impeded the latter objective. While organ transplantation training and technology in developed nations has grown affordable and accessible, the supply of donated organs for these operations remain vastly lower than demand.

One explanation for this organ shortage is that attitudes to the body, living and dead, have not kept pace with technology. Most organs are procured for transplantation by

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altruistic donation. This article focusses specifically on cadaveric donation by the recently deceased or brain-dead, which can be done for various organs with high rates of success.<sup>1</sup> The *no property in the body* principle forbids sales, thus limiting the supply of transplant organs to those donated (that is, without compensation). Unfortunately, this practice facilitates fewer transplantations than are needed to save the lives of all who suffer organ failure. In 2011, 477 New Zealanders began to receive renal replacement therapy, while replacement kidney transplants totalled only 118; patient deaths totalled 412; of these, 44 had undergone transplant surgeries, but the vast majority (368) died while on dialysis (an expensive and non-curative alternative), presumably waiting for a transplant.<sup>2</sup>

This article will analyse this *organ shortage* problem from a consequentialist perspective. The restriction of property rights over cadaveric organs under the current legal paradigm fails to efficiently incentivise and safeguard the retrieval of those organs for lifesaving procedures. Part II overviews domestic and international law regarding property rights in cadavers and organs. Part III provides an economic analysis of cadaveric procurement, and recommends a heavily regulated property right in cadaveric organs, exercisable through futures contracts for cadaveric procurement. Part IV assesses non-consequentialist opposition to property rights revolving around Kantian dignity and the commodification of the human body. Ultimately, a detailed and highly regulated monopsonistic system allowing the sale and purchase of futures contracts for the right individuals' organs in the event of their death would efficiently increase organ procurement. With careful implementation it could save lives while negotiating and accommodating legitimate normative concerns.

#### A *Focussing on the deceased organ supply*

According to a law and economics analysis of organ procurement, the greatest potential increase in efficiency derives from the improvement of donation rates from cadaveric donors. While live transplants of some organs are possible, many organs cannot be donated until death. Although similar utilitarian and deontological concerns (around efficacy, autonomy, and dehumanisation, amongst others) attach to living and deceased donation, they diverge sufficiently in character and potential outcomes to warrant separate analyses.<sup>3</sup> This article's consequentialist focus mandates highlighting the more politically and practically feasible development: cadaveric procurement. Should the transplant kidney shortage survive a futures market, live sales should be considered—but elsewhere.<sup>4</sup>

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1 Austen Garwood-Gowers *Living Donor Organ Transplantation: Key Legal and Ethical Issues* (Ashgate, Vermont, 1999) at 17–21.

2 Blair Grace, Kylie Hurst and Stephen McDonald “Chapter 1: Stock and Flow” in Stephen McDonald, Philip Clayton and Kylie Hurst (eds) *ANZDATA Registry Report 2012* (Australia and New Zealand Dialysis and Transplant Registry, Adelaide, 2012) at [Figure 1.1]. The example of kidneys is salient because even though live donations are also viable, the need for transplants still outweighs donation rates.

3 See Henry Hansmann “The Economics and Ethics of Markets for Human Organs” (1989) 14 *Journal of Health Politics, Policy and Law* 57; and Debra Satz “The Moral Limits of Markets: The Case of Human Kidneys” (2008) 108 *Proceedings of the Aristotelian Society* 269.

4 Hansmann, above n 3, at 71. An additional merit to distinguishing between live and cadaveric markets is that public sentiment is not cast in stone and may soften regarding cadaveric donation in the event of a successful futures market.

Finally, this article discusses the problem of increasing organ supplies. Distribution decisions require separate analysis.<sup>5</sup> Practically, New Zealand's small population limits the scale of any distribution network.<sup>6</sup> This low ceiling would leave comparatively little room for competition, rendering the administration costs for multiple separate participants potentially prohibitive.<sup>7</sup> Centralised, state-administered distribution systems usually mitigate concerns about morally ambiguous sales practices and decision-making by profit-motivated actors.<sup>8</sup> These concerns inform Part IV. Any distribution framework should ideally fit within the existing healthcare system to ensure its successful internalisation.<sup>9</sup>

## II The Law on Organ Property Rights

Internationally, norms governing deceased bodies are broadly consistent. The rule of *no property in the body* appears across jurisdictions, foreclosing any question of organ sales.<sup>10</sup> This section critically examines Western development of the *no property* rule and its *work and skill* exception. It then unpacks the Western simplification of property rights, before examining how the law limits cadaveric organ procurement in practice in New Zealand.

### A *International common law: the no property rule*

#### (1) England: no property in a corpse

Moral panic over grave robbing in England during the 18th century gave rise to the first real consideration of property rights over the human body, producing a rule of “no property in a corpse”.<sup>11</sup> This bars any proprietary claim of ownership, possession, or sellable interest.<sup>12</sup>

#### (2) New Zealand adoption

The Supreme Court in *Takamore v Clarke* reaffirmed the *no property in a corpse* rule, rejecting the existence of proprietary rights capable of supporting tortious claims.<sup>13</sup> The Court dismissed two possible claims to a corpse: first, a quasi-property right to possess for the purpose of disposal, and secondly, a claim that an executor could exclusively dispose of corpses as they would estate property generally.<sup>14</sup> Instead, the Court holistically

5 See Richard Schwindt and Aidan R Vining “Proposal for a Future Delivery Market for Transplant Organs” (1986) 11 *Journal of Health Politics, Policy and Law* 483 at 483–490; and Lloyd R Cohen “Increasing the Supply of Transplant Organs: The Virtues of a Futures Market” (1989) 58 *Geo Wash L Rev* 1 at 29–30.

6 Organ Donation New Zealand *Annual Report 2015* (September 2016) at 11–14.

7 Schwindt and Vining, above n 5, at 488–489.

8 At 490.

9 Firat Bilgel *The Law and Economics of Organ Procurement* (Intersentia, Cambridge, 2011) at 70. Note that New Zealand has a fairly centralised healthcare system.

10 *Doodeward v Spence* (1908) 6 CLR 406 at 421.

11 *Haynes' Case* (1614) 77 ER 1389; *R v Lynn* (1788) 2 TR 733; *R v Price* (1884) 12 QB 247; and *Williams v Williams* (1882) 20 ChD 659.

12 William Potts “Increasing the Supply of Transplant Organs by way of Financial Incentives” (2005) 31 *Mon LR* 212 at 223.

13 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

14 At [58], [70]–[71], [84] and [90].

analysed the various parties' relationships and interests in order to determine where the burial should occur, without granting an exclusive right to the corpse itself.<sup>15</sup>

### (3) Australian development: the *work and skill* exception

*Doodeward v Spence* formulated a substantial exception wherein a corpse might "become" property through lawful exercise of "work and skill".<sup>16</sup> The exception is Lockean in nature, granting property rights where work imparts attributes to the bodily materials differentiating them from an ordinary corpse.<sup>17</sup>

Despite widespread common law and statutory adoption, the *work and skill* exception has faced criticism. These include questions of whether work in the absence of skill suffices; what type or quantity of work is required; and whether work must be completed to impart varying property rights into various body parts.<sup>18</sup> Answers have been inconsistent and often arbitrary. In *R v Kelly*, weeks of preservation work rendered stolen body parts recoverable property; however, in *Dobson v North Tyneside Health Authority* the preservation of a brain in paraffin wax was insufficient to ground a conversion claim.<sup>19</sup>

It is unclear whether the exception could logically extend to one's own cadaveric organ sales. In living-donor sales, procuring one's own transplant procedure and enduring the requisite suffering and incapacity of organ removal might constitute sufficient work. Deciding while alive to let another harvest one's organs upon death, or an estate allowing a decedent's organs to be harvested, might be tenuously deemed work, but consenting requires no discernible skill.<sup>20</sup> Organs are not property while inside the body but become so through the removal process—this problematizes the ability to contract for their sale.<sup>21</sup> However, this does not reflect how any organ sales model would realistically function, with purchase agreements being concluded prior to removal; it would render such an agreement essentially a futures contract to retrieve and possess an item which factually exists but is not yet deemed property.<sup>22</sup>

### (4) The American experience: who controls valuable body materials?

United States jurisprudence in the 20th and 21st centuries grappled with the advent of a *gold rush* in human materials; developments in research and biotechnology transformed the human body into a valuable scientific resource.<sup>23</sup> While consistently resisting the

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15 At [142].

16 *Doodeward v Spence*, above n 10, at 421–422.

17 At 413; see also David Price *Human Tissue in Transplantation and Research: A Model Legal and Ethical Donation Framework* (Cambridge University Press, Cambridge, 2009) at 259–260; and Anne Phillips *Our Bodies, Whose Property?* (Princeton University Press, Princeton, 2013) at 29.

18 Rohan Hardcastle *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing, Oxford, 2007) at 29.

19 *R v Kelly* [1999] QB 621 (CA) at 624 and 631; and *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 (CA) at 601.

20 Antonia J Cronin and David Price "Directed organ donation: is the donor the owner?" (2008) 3 *Clinical Ethics* 127 at 128–129.

21 Margaret Jane Radin *Contested Commodities* (Harvard University Press, Cambridge (Mass), 1996) at 98.

22 Stephen R Munzer "An uneasy case against Property Rights in Body Parts" (1994) 11(2) *Social Philosophy and Policy* 259 at 265.

23 Suzanne Holland "Contested Commodities at Both Ends of Life: Buying and Selling Gametes, Embryos, and Body Tissues" (2001) 11 *Kennedy Institute of Ethics Journal* 263 at 265–266.

notion of property in the body, courts have essentially allowed individuals to profit from human materials. The Court in *Washington University v Catalona* even indicated a nascent willingness to explore property as a means of organising possessory rights over bodily matter.<sup>24</sup> Though tangential to the specific question of organ sales, these developments provide insight into the wider normative considerations underpinning the question of property rights in bodily materials.

*Moore v Regents of the University of California* dealt with a group of doctors concealing the removal and preservation of cells from Moore's spleen in order to establish and privately patent a highly lucrative cell line.<sup>25</sup> The preservation and establishment of the cell line was not pertinent to Moore's treatment, and the practitioners' failure to disclose their pecuniary interest grounded a consent claim. However, Moore's claim to a proprietary interest in the cell line was dismissed.<sup>26</sup> The court's justification included protecting medical research, but Arabian J stressed philosophical, moral, and religious concerns with regarding "the human vessel—that the single most venerated and protected subject in any civilised society—as equal with the basest commercial commodity," stating that Moore "urges us to commingle the sacred with the profane. He asks much".<sup>27</sup>

*Greenberg v Miami Children's Hospital* upheld an unjust enrichment claim against researchers who patented a genetic sequence researched using charitably-donated materials, while affirming that there was no property in the body.<sup>28</sup> Reaching a similar outcome by different means, *Washington University v Catalona* effectively upheld the university's property right to Dr Catalona's tissue repository when the doctor, supported by 6,000 donors, attempted to move it to another university.<sup>29</sup> The Court dismissed any notion of donors' ownership interest, reasoning that allowing donors to determine what became of their tissue post-donation was akin to blood donors denying donated blood to certain ethnic groups, arguably conflating an enormous financial interest with the moral allocation of blood based on need.<sup>30</sup>

Subsequent criticism of *Moore* frames the *no property* rule as normalising financial gain from human materials for all involved parties, except for donors and their families.<sup>31</sup> Both the majority and minority justified their positions with reference to socioeconomically-iniquitous exploitation and human rights violations.<sup>32</sup> This question, of whether property rights in the long-term enhance or undercut vulnerable citizens' agency, permeates scholarship on proprietary rights in body parts.

#### (5) Disaggregating "property"

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24 *Washington University v Catalona* 437 F Supp 2d 985 (ED Mo 2006).

25 *Moore v Regents of the University of California* 793 P 2d 479 (Cal 1990).

26 At 487.

27 At 497.

28 *Greenberg v Miami Children's Hospital Research Institute* 264 F Supp 2d 1064 (SD Fla 2003) at 1073.

29 *Washington University*, above n 24.

30 At 993–994 and 1002.

31 Potts, above n 12, at 225; Troy R Jensen "Organ Procurement: Various Legal Systems and Their Effectiveness" (2000) 22 Hous J Intl L 555 at 556 and 580; and Thomas G Peters "Life or Death: The Issue of Payment in Cadaveric Organ Donation" (1991) 265 Journal of the American Medical Association 1302 at 1302.

32 Potts, above n 12, at 225–226; and Julia D Mahoney "The Market for Human Tissue" (2000) 86 Va L Rev 163 at 166–177.

Mosk J's dissent in *Moore* criticised the Court's over-simplification of property as an all-or-nothing concept.<sup>33</sup> He contended that while Moore might lack unfettered rights of sale or transfer, he should have "the right to do with his tissue whatever the defendants did with it".<sup>34</sup> It was suggested that the majority effectively granted a property right in Moore's biological materials to researchers who exploited him.

Despite its ubiquitous usage, *property* has been given varying and contested meanings. *Property rights* are the theoretical constructs through which subjects interact with and relate to objects in the world, and their construction informs the interactions they facilitate.<sup>35</sup>

Locke's writing posits ownership rights as natural due to God's bequest of Earth to "mankind in common" preceding the state; because a person has "property in his own person", he privately owns objects he removes and improves by labour.<sup>36</sup> For Lockean and libertarian approaches, private law's core normative function is tracing and entrenching existing rights—leaving dispositions of legitimate property to the discretion of owners.<sup>37</sup> Were organs identifiable as property (whether intrinsically or through work and skill), current limits on alienation rights could be justifiable only by externalities—not by paternalism.<sup>38</sup>

Conversely, consequentialist perspectives reject immanent property rights with intrinsic substance.<sup>39</sup> Potts contends that property in corpses is "no more than a synonym for 'legally enforceable decision-making authority about the use of human body parts'".<sup>40</sup> Law and economics theory views problems in terms of utility and efficiency, thus the law allocates rights and liabilities through benefits to social utility.<sup>41</sup>

In modern law, property rights are a bundle of rights describing multifaceted and variable relationships between subjects and objects.<sup>42</sup> A Hohfeldian, disaggregated understanding of property allows for varying rights, powers and duties relating to an object, including possession, exclusion and alienation (for profit or otherwise).<sup>43</sup> This approach recognises first-order rights (for example, to use one's organs whilst alive) and second-order powers to vary those rights (for example, by shifting possession over one's organs to another person). Cadaveric organs might, therefore, be understood to already be property; protected against expropriation and intrusion while subject to limitations against market-alienability.<sup>44</sup> This article advocates for a disaggregated

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33 *Moore*, above n 25, at 506–523.

34 At 510.

35 Phillips, above n 17, at 31–32.

36 John Locke *Second Treatise of Government* (eBook ed, Infomotions, 2000) at 13.

37 Robert Nozick *Anarchy, State, and Utopia* (Blackwell, Oxford, 1975) at 149–150.

38 J Radcliffe Richards "From Him that Hath Not" in Walter Land and John B Dossetor (eds) *Organ Replacement Therapy: Ethics, Justice Commerce* (Springer-Verlag, Berlin, 1991) 190 at 191.

39 C Edwin Baker "Property and its relation to Constitutionally Protected Liberty" (1986) 134 U Pa L Rev 741 at 742–755.

40 Potts, above n 12, at 227.

41 See generally Guido Calabresi and A Douglas Melamed "Property Rules, Liability Rules, and Inalienability: One view of the Cathedral" (1972) 85 Harv L Rev 1089.

42 JE Penner "The 'Bundle of Rights' Picture of Property" (1996) 43 UCLA L Rev 711 at 712.

43 See Lyria Bennett Moses and Nicola Gollan "'Thin' property and controversial subject matter: Yanner v Eaton and property rights in human tissue and embryos" (2013) 21 Journal of Law and Medicine 307 at 309; and Radin, above n 21, at 16–18.

44 Robert S Taylor "Self-Ownership and Transplantable Human Organs" (2007) 21 Public Affairs Quarterly 89 at 90.

approach to organs in Part III, with the only legally substantial change being market-alienability following death.

### B *New Zealand law*

New Zealand is consistent with international norms in having no positive law recognising property rights in human organs.<sup>45</sup> Property right-type obligations regarding corpses and body parts are consistently implemented in language careful not to demarcate them as property.<sup>46</sup> This section provides an overview of domestic law around cadaveric organs in a donation context, and unpacks existing paradigms' impediments to the successful procurement of transplant organs.

#### (1) Human Tissue Act 2008

In New Zealand, cadaveric organs fall under the purview of the Human Tissue Act 2008 (HTA). The HTA explicitly prohibits the sale of human organs in any form.<sup>47</sup> However, donations (living and dead) are permitted with informed consent. The Act's purpose broadly invokes a variety of specific autonomy and dignity concerns for individuals: cultural, ethical, and spiritual factors; public policy considerations; and moral opposition to payments for tissue.<sup>48</sup>

Most types of retrieval, including organ donation, research, and retrieval for educational purposes, require informed consent on the part of the deceased donor or their nominee.<sup>49</sup> A primary barrier to effective procurement of cadaveric organs is the strict formal requirements for informed consent. Consent must be in writing or expressed orally before two valid witnesses, and must actually reach those responsible for retrieving the organs.<sup>50</sup>

New Zealand does require a mandated choice on whether to register as a donor from driver's licence applicants, but this disposition is not legally binding.<sup>51</sup> As such, a decedent's wishes will often not be binding in the absence of a will or advanced directive, and registering as a donor may in some circumstances encourage complacency by reducing citizens' compulsion to discuss donations with family.<sup>52</sup> A 2006 Bill proposing legally binding licence registration failed to pass, with some medical practitioners vocally opposed to carryimh out procedures against the will of decedents' families.<sup>53</sup>

Where a decedent's wishes are unclear the law presumes no consent. Ameliorating this presumption is a "hierarchical consent" schedule under which a nominee, immediate

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45 See Garwood-Groves, above n 1.

46 Crimes Act 1961, s 150. Section 150 prohibits improper interference with any dead body.

47 Human Tissue Act 2008, s 56. But see s 56(1) which allows a minister-approved exception under s 60.

48 Section 3(a)- 3(c).

49 Sections 19(1)(a) and 31-34.

50 Section 9.

51 NZ Transport Agency "Organ and Tissue Donation" (2016) NZ Transport Agency <[www.nzta.govt.nz](http://www.nzta.govt.nz)>.

52 Jennifer J Howard "Fatal Flaws: New Zealand's Human Tissue Act fails to provide an avenue for individuals to give Legally Binding Informed Consent" (2012) 22 Pac Rim L & Poly J 209 at 212.

53 Martin Johnson "Doctors Oppose Organ Donor Bill" (1 May 2006) New Zealand Herald <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

family member or available relative may informedly consent on decedents' behalf (in that order), with each party able to overrule consent provided by those "below" them.<sup>54</sup>

Informed consent has proved practically ineffective. Practitioners always consult with decedent's families and will not retrieve organs if they object.<sup>55</sup> Further, practitioners often simply do not discuss donation with decedent families, lowering retrieval rates where the issue is not broached.<sup>56</sup>

"Hierarchical consent" and familial consultation contribute to an "anticommons" problem, granting various parties effective veto rights over potential donations, to the detriment of potential recipients.<sup>57</sup> While efforts to avoid upsetting the families of decedents are admirable (particularly as suitable potential donors often die abruptly and violently), they can conflict with both organ retrieval rates and decedents' wishes.<sup>58</sup> Nonetheless, families usually adhere to a decedent's express wishes—issues primarily arise where wishes are unclear.<sup>59</sup>

## (2) Living donors

Domestic law does allow some consent-based controls for living tissue donors which superficially function like property rights, without actually allocating entitlements to tissue.<sup>60</sup> Instead, the law imposes criminal sanctions to prevent violations. The *in personam* nature of civil consent claims affords more limited control to tissue's originators than if patients were granted rights regarding bodily materials which were exercisable *in rem*. This limited control has been criticised as iniquitous in light of modern biotechnology's ability to utilise bodily materials enormously profitably.<sup>61</sup>

The Compensation for Live Organ Donors Act 2016 came into force on 5 December 2017. It provides for live organ donors to receive compensation equal to 100 per cent of lost income for up to 12 weeks for the donation of an organ.<sup>62</sup> At the discretion of the Director-General compensation may also be provided for costs associated with preparing to donate.<sup>63</sup> No financial value is attached to the organ itself, which is not treated as saleable property.<sup>64</sup> This should significantly ameliorate hardships faced by live donors, and removes financial concern as a significant barrier to donation by the financially

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54 Human Tissue Act, ss 9 and 31(2).

55 See Organ Donation New Zealand "Everything you need to know about donation" <[www.donor.co.nz](http://www.donor.co.nz)>.

56 Cohen, above n 5, at 13–14.

57 Mahoney, above n 32, at 203.

58 World Health Organisation "Draft guiding principles on human organ transplantation" (October 1990) <[www.who.int](http://www.who.int)> at Guiding principle 1.

59 Laura A Siminoff and Renee H Lawrence "Knowing Patients' Preferences about Organ Donation: Does it Make a Difference?" (2002) 53 *The Journal of Trauma and Acute Care Surgery* 754 at 754 and 759.

60 The Health and Disability Commissioner Code of Health and Disability Services Consumers' Rights 1996, rights 7(7) and 7(9); and Human Tissue Act, s 62.

61 Imogen Goold and Muireann Quigley "Human Biomaterials: The Case for a Property Approach" in Imogen Goold and others (eds) *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart Publishing, Oxford, 2014) 231 at 253; and Moore, above n 25.

62 Compensation for Live Organ Donors Act 2016, s 10.

63 Section 12.

64 This point was emphasised at various points throughout the Bill's passage into law, such as by Chris Bishop. See (9 November 2016) 718 NZPD 14924.



insecure.<sup>65</sup> However, it does not go further to positively encourage donation, and seems unlikely to singularly significantly increase donation rates.

### (3) Concluding thoughts on the current law

The *no property* rule is a flawed approach to the legal treatment of human organs due to its logical inconsistency and reductive understanding of property. Its broad-brush nature has further been criticised as arbitrarily reframing a policy question (organ sales) into abstract questions over a social construct.<sup>66</sup>

Common law illustrates the potential utility of property approaches in resolving entitlement and control disputes, but any such rights would have to flow from the legislature.

## III Solving the Organ Shortage: Cadaveric Organ Sales

From the perspective of law and economics, the avenue for greatest improvement in wellbeing comes from improving rates of cadaveric donation. Law and economics approaches militate in favour of granting property rights in cadaveric organs, alienable in the form of a tightly-regulated market for organ futures. This section outlines a futures model and attempts to accommodate potential consequential objections.

Cohen contends that “the problem of valuable organs going to waste cries out for a market solution”.<sup>67</sup> Cadaveric organs have no value to decedent owners, but could save patients’ lives. Allowing organ providers to participate in this transfer of value is an excellent means of ensuring such transfers occur.<sup>68</sup> The best mechanism for this participation is the expansion, rather than diminution, of property rights in organs by allowing their sale.<sup>69</sup> Clay and Block characterise the enforcement of altruistic donations as effectively setting a \$0 price ceiling on organ provision with the effect of leaving potential “suppliers” unwilling to meet inelastic demand.<sup>70</sup> It is this “demand”, the vast quantities of patients on waitlists who will die awaiting transplantation, that will justify an efficiency-increasing property approach.<sup>71</sup> The law and economics approach is fundamentally practical and as such the political acceptability of any proposal will inform its viability.<sup>72</sup>

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65 The change in language from the welfare-type language of “financial assistance” in the original bill’s title to “compensation” (which seems to better recognise the effort and sacrifice made by donors) is also appealing in recognising the sacrifice and efforts of donors. This was emphasised by, amongst others, Simon O’Connor: See (30 November 2016) 719 NZPD 15395.

66 Alexandra George *Property in the Human Body & Its Parts: Reflections on Self-Determination in Liberal Society* (European University Institute, EUI Working Paper LAW No 2001/8, 2001) at 63 and 74.

67 Cohen, above n 5, at 25.

68 Lloyd R Cohen “Directions for the Disposition of My (and Your) Vital Organs” (2005) 28(3) *Regulation* 32 at 34.

69 Cohen, above n 5, at 2.

70 Megan Clay and Walter Block “A Free Market for Human Organs” (2002) 27 *The Journal of Social, Political, and Economic Studies* 227 at 228.

71 Cohen, above n 5; Mahoney, above n 32; and Clay and Block, above n 70.

72 Gregory S Crespi “Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs” (1994) 55 *Ohio St L J* 1 at 76–77; and Cohen, above n 5, at 2.

### A Failures of the status quo

Current under-retrieval of organs has two chief causes: first, the barriers to donor registration and secondly, barriers to the actual retrieval of donors' organs.

#### (1) Donor-based reasons

As it stands, the only incentives for potential cadaveric organ donors to ensure donation will occur is the psychological benefit or sense of meaning that they personally attach to donation.<sup>73</sup> Within the bounded rationality of donors<sup>74</sup> and veto-possessing family members, these abstract benefits will often fail to overcome three primary psychological barriers Cohen identifies as standing in the way of donation:<sup>75</sup>

- (1) Fear of “over-eager doctors” hastening death;
- (2) Aesthetic or religious objections to dismemberment; and
- (3) Unwillingness of individuals to consider their own mortality.

These aversions are often complicated but not deeply entrenched. The first objection is rational, but adequate procedural safeguarding mitigates any genuine risk, leaving only individuals' residual irrational concern.<sup>76</sup>

If the second set of objections were universal and deeply-held, the organ shortage would likely be insurmountable. However, various case studies point to widespread acceptance for organ transplantation and medical utilisation of cadavers.<sup>77</sup> All major religions consider cadaveric donation to be morally desirable, and sociological data indicates widespread acceptance of such practices (at least, as they occur to others).<sup>78</sup>

A potential exception in New Zealand is the historic primacy of the body in tikanga Māori conceptions of law. However, a Ministry of Health report indicates that tikanga adherents are increasingly amenable to transplantation.<sup>79</sup> This may be due to the belief system's flexibility and the compatibility of donations with tikanga concepts of reciprocity and communal responsibility.<sup>80</sup> Such adherence is merely one of many factors considered by potential patients. Therefore, it should be considered within the same nexus of personal factors as other religious or cultural hesitance rather than being determinative of a nationwide policy.

The third barrier is reflected in polling, the body of psychological writing on fear and avoidance of death, and the rarity of other provisions for death.<sup>81</sup> Informed consent and discussing donation with one's family forces potential donors' families to seriously contemplate death, which, absent any incentive to do so, has a psychological “cost” to both donors and relatives weighing against positive decision-making.<sup>82</sup>

Cohen assumes that most aversions to behaviour can be more efficiently overcome by sufficient counter-incentives than by trying to eliminate people's complicated

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73 Cohen, above n 5, at 8–10.

74 Reinhard Selten “What Is Bounded Rationality?” in Gerd Gigerenzer and Reinhard Selten (eds) *Bounded Rationality: The Adaptive Toolbox* (MIT Press, Cambridge (Mass), 2001) 13.

75 Cohen, above n 5, at 9.

76 At 8–11.

77 At 10.

78 At 10.

79 Mauri Ora Associates *Māori Pacific Attitudes Towards Transplantation: Professional Perspectives* (2009) at 48.

80 At 49.

81 Cohen, above n 5, at 11.

82 At 11.

psychological opposition.<sup>83</sup> For sufficient payment, most people will perform work even if they find it somewhat unpleasant.<sup>84</sup> Further, changing modes and levels of social pressure applied to potential donors have been demonstrated to impact on donation results—there is no reason to assume financial incentivisation would not work similarly (but less coercively).<sup>85</sup>

## (2) Process-based failures

The overwhelmingly voluntarist model of organ donation in New Zealand presumes unwillingness to donate and provides medical practitioners with little incentive to overcome parties' natural unwillingness to broach the subject of donation. Medical practice tends towards hesitancy to retrieve organs for various reasons. Doctors are morally apprehensive and fear negative publicity or legal consequences should they retrieve organs without consent or appear to unduly pressure survivors into providing consent.<sup>86</sup> The medical processes of converting a former patient into a viable cadaveric donor is also psychologically taxing.<sup>87</sup> Practitioners responsible for collecting organs are typically charged with confronting recently-bereaved relatives with a request to dismember their next-of-kin before either party has had any chance to process the loss.<sup>88</sup> Grieving families are psychologically embattled by such requests and may refuse or withdraw consent against both their better judgement and the will of the decedent—a problem exacerbated by the “anticommons” effect of existing practice.<sup>89</sup> Knowing this to be the case, and lacking any countervailing incentive to press the issue, practitioners may prefer abandoning organs to consulting a decedent's family.<sup>90</sup>

This arguably entails a “triple loss”, wherein families simultaneously lose a relative and the comfort of knowing their relative could save others' lives, while the decedent's wishes to have their organs donated are not honoured.<sup>91</sup> Though comparatively minor compared to costs suffered by waitlist patients (whose lives hang in the balance), factors preventing donation outweigh positive incentives to ensure donation occurs.<sup>92</sup> Sells' assertion that family vetoes would heavily problematise a futures market is flawed due to the aforementioned unlikelihood that families would obstruct a decedent's wish to be donated (especially when discussed with them before contracting) because it included a payment to their estate.<sup>93</sup> Further, the net increase to the pool of registered donors would

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83 At 11.

84 At 11. This argument suggests that even in health-risking live donations, sales could prove effective as an incentive.

85 At 16.

86 Jeffrey M Prottas “The Rules for Asking and Answering: The Role of Law in Organ Donation” (1985) 63 *University of Detroit Law Review* 183 at 183 and 190; and RA Sells “The Case Against Buying Organs and a Futures Market in Transplants” (1992) 24 *Transplantation Proceedings* 2198 at 2201.

87 Luke Skelley “Practical Issues in Obtaining Organs for Transplantation” (1985) 13 *Law, Medicine & Health Care* 35 at 35–37.

88 Siminoff and Lawrence, above n 59, at 755.

89 Cohen, above n 5, at 13–14; and Clive O Callender “Legal and Ethical Issues Surrounding Transplantation: The Transplant Team Perspective” in Dale H Cowan and others (eds) *Human Organ Transplantation: Societal, Medical-Legal, Regulatory, and Reimbursement Issues* (Health Administration Press, Michigan, 1987) 42 at 47.

90 Siminoff and Lawrence, above n 59, at 755.

91 Clay and Block, above n 70, at 228–230.

92 Cohen, above n 5, at 15.

93 Sells, above n 86, at 2200.

outweigh some remaining familial obstruction. Ideally, sensitive handling of paid donations will allow utility-increasing donation, without creating disutility through alienating upset families from the medical system.

Finally, the absence of potential recipients' rights and interests in the procurement process prevents recipients from deploying their personal investment to ensure successful retrievals.<sup>94</sup> Schwindt and Vining frame the familial veto right as already granting a weak property right, and argue that allowing full property claims for purchasers would have "a salutary effect on each step of the procurement process", encapsulating the initial willingness to donate an organ, hospital cooperation, familial consent-granting and the eventual donation of the organ.<sup>95</sup>

### B *Non-compensatory alternatives to informed consent*

Another alternative to informed consent is "escheatage" which reverses the presumption of unwillingness to have one's organs retrieved, with a possible option of "opting out" from the scheme whilst alive.<sup>96</sup>

However, escheatage would not bypass many barriers to donation. Where donation rates are low due to specific fears, citizens would withdraw consent and decedents' relatives might obstruct procurement posthumously.<sup>97</sup> If holdouts were solely motivated by discomfort with contemplating mortality, escheatage might be Pareto superior to positive-consent models (that is, improving outcomes for some individuals without creating any losses) by increasing collection rates while bypassing the discomfort of contemplating mortality.<sup>98</sup> However, escheatage might not relieve a doctor's moral obligation to seek the consent of relatives (who will be more likely to veto), and has internationally failed to increase donation rates.<sup>99</sup>

Escheatage seems to challenge the *no property in the human body* norm, but situates bodily entitlements in the state, with reassignment to individuals available on request.<sup>100</sup> Crespi criticises escheatage as uncompensated taking of property.<sup>101</sup> Taylor suggests that escheatage may fail to respect persons' dignity, by penetrating sovereign bodily rights of exclusion, transfer, and immunity from expropriation.<sup>102</sup> For Taylor, empowering one's relatives to consent on one's behalf is legitimate due to their presumed ability to represent the decedent's preferences more accurately than the state's baseless assumption either way.<sup>103</sup> Further, the "mistake cost" of wrongfully dismembering a non-consenting decedent is less widely-acceptable than failing to retrieve organs from a consenting

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94 Schwindt and Vining, above n 5, at 486. Procurers would be financially motivated, but still agents for the dying.

95 At 486.

96 Aaron Spital and Charles A Erin "Conscription of Cadaveric Organs for Transplantation: Let's at Least Talk About It" (2002) 39 *American Journal of Kidney Diseases* 611 at 612.

97 Cohen, above n 5, at 18.

98 Schwindt and Vining, above n 5, at 487. Their total rejection of compulsory expropriation is partly grounded in the "disutility some people would experience at the thought of organ removal." See at 497.

99 Taylor, above n 44, at 92; and Crespi, above n 72, at 53-54.

100 Taylor, above n 44, at 94.

101 Crespi, above n 72, at 54.

102 Taylor, above n 44, at 94. See also John Christman "Self-Ownership, Equality and The Structure of Property Rights" (1991) 19 *Political Theory* 28; and John Christman *The Myth of Property: Toward and Egalitarian Theory of Ownership* (Oxford University Press, New York, 1994) at 160.

103 Taylor, above n 44, at 95.

decedent.<sup>104</sup> Given its normative and practical ambiguity, escheatage appears inferior to other alternatives.<sup>105</sup>

*C The proposed solution: a futures market in organs*

This section advocates a restrictive futures model of organ selling to maximise procurement rates while minimising transaction costs and perverse incentives.<sup>106</sup>

This model empowers individuals to contractually sell their organs, for delivery following death. Contracts would be made with private procurers or a state agency, rather than individual recipients. Distribution could be handled separately, by the state or market health providers. Cadaveric organs would be treated as property with purchasers able to lay claims and hospitals obliged to preserve them as bailees.

Futures contracts have various ethical advantages. By precluding live acquisitions they avoid much exploitation of the vulnerable.<sup>107</sup> Focussing on procurement prevents wealth affecting the allocation of life-saving transplants. Crucially, by allowing people to sell their own organs, futures contracts treat donation as an individual decision, bypassing family pressure to traffic in the remains of their relatives.<sup>108</sup>

A core issue in cadaveric organ procurement is that circumstances conducive to viable donations are often unconducive to the positive decision-making donation requires. Organs cannot practically or ethically be purchased from the dead or those close-to-death.<sup>109</sup> The young and healthy are unlikely to consider donation.<sup>110</sup> Equally, grieving families are not equipped for time-sensitive donation decisions, and cannot legally and morally sell relatives' corpses.<sup>111</sup> Ideal decision-making would occur whilst healthy, without an imminent possibility of becoming a donor.<sup>112</sup>

(1) Monetary payment

Payment proposals take three broad forms:<sup>113</sup>

- (1) Payment on contracting;
- (2) Payment on delivery of body (regardless of whether organs are viable); and
- (3) Payment on procurement of viable organs.

Payment on contracting leaves sellers bound by agreements either in perpetuity or subject to renewal.<sup>114</sup> Payment preceding delivery risks fraud by re-sale of procurement rights and posthumous familial obstruction.<sup>115</sup> The first two options would pay all contractors

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104 At 94–95; and Sells, above n 86, at 2200.

105 Cohen, above n 5, at 15–16; and Crespi, above n 72, at 54.

106 See Schwindt and Vining, above n 5; Hansmann, above n 3; and Cohen, above n 68.

107 Cohen, above n 5, at 2.

108 At 2.

109 Hansmann, above n 3, at 62; and Cohen, above n 5, at 32.

110 Hansmann, above n 3, at 62; and Cohen, above n 5, at 32.

111 Schwindt and Vining, above n 5, at 488; and Taylor, above n 44, at 91.

112 Hansmann, above n 3, at 70.

113 See Crespi, above n 72.

114 Hansmann, above n 3, at 62–63.

115 Hansmann notes that families may contravene decedent wills if they see them as being unduly induced.

regardless of procurement and thereby risking prohibitive expense or under-incentivisation due to small pay outs.<sup>116</sup>

Beyond inefficiency, there is no normative reason to disallow payment on delivery of bodies.<sup>117</sup> Though necessarily smaller than payments contingent on organ viability, such contracts might prove more effective as an incentive.<sup>118</sup> Both payment-on-delivery models eliminate the risk of individuals contracting from immediate financial exigency.<sup>119</sup>

Payment on delivery of viable organs would procure the same total useable organs, whilst minimising total payments made.<sup>120</sup> Postponing examinations of medical suitability and minimising fraud risks is administratively efficient. However, this option has some weaknesses. Individuals are unlikely to receive payments and do not receive payment whilst alive—potentially reducing registrations.<sup>121</sup> Cohen suggests that adequate prices would nonetheless suffice, provided contracting was painless and accessible.<sup>122</sup> For those indifferent to their surviving estate, payment on contracting might be possible, though Cohen considers such individuals a minority unlikely to undermine the entire scheme.<sup>123</sup> Crespi suggests that where individuals die without a contract or opposition, relatives might sell their organs with proceeds going to charity.<sup>124</sup>

## (2) Non-monetary payment

One response to moral and political objections regarding commerce in human body parts is that the payment need not be explicitly monetary. Alternatives ranging from the simple substitution of valuable goods and services for money to more truly indirect reward schemes are possible.

It is unlikely that rewards of little recognisable value would meaningfully increase organ supply.<sup>125</sup> “Merit” rewards, such as education or vocational training credits, have been proposed.<sup>126</sup> However, these might appear to objectionably make social welfare contingent on organ donation.<sup>127</sup> Reciprocal “payment[s]-in-kind”—for example, medical insurance premium reductions or priority access to transplant organs whilst living—are similarly objectionable.<sup>128</sup>

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116 Cohen, above n 5, at 32–33; and Robert M Veatch “Why Liberals Should Accept Financial Incentives for Organ Procurement” (2003) 13 *Kennedy Institute of Ethics Journal* 19 at 22–23.

117 Crespi, above n 72, at 38.

118 At 43–44.

119 At 37–38.

120 Cohen, above n 5, at 33.

121 Crespi, above n 72, at 29.

122 Cohen, above n 5, at 35. The market for life insurance and the practice of will-making generally suggest that people do care about their estates after death to a noticeable degree.

123 Cohen, above n 5, at 43.

124 Crespi, above n 72, at 36.

125 Veatch, above n 116, at 21.

126 Schwindt and Vining, above n 5, at 496.

127 Satz, above n 3, at 275. Author argues that we should not require people to “pay a cost” for the unwillingness to sell their organs. Publicly-funded programs contingent on donation trigger similar discomfort.

128 Schwindt and Vining, above n 5, at 495; Hansmann, above n 3, at 63–65; and Cohen, above n 68, at 33. Israel employs a controversial “don’t ask don’t get” provision, which prioritises registered organ donors in situations where medical need is otherwise equal. Despite the slim chances of this priority actually affecting allocation decisions, the policy has been credited with ±10 per cent improvement in registration: Tamar Ashkenazi, Jacob Lavee and Eytan Mor “Organ Donation in Israel—Achievements and Challenges” (2015) 99 *Transplantation* 265.

Efficient proposals will avoid expenditure except on procurement of organs. Payments could go to decedent-chosen charities, rather than their estate.<sup>129</sup> This would preserve the altruistic instinct prompting current donations.<sup>130</sup> Though not appealing to the self-interest of donors, charities standing to benefit would be encouraged to promote organ donation themselves.<sup>131</sup> Funerary expense contributions have seen widespread discussion as offering clear commensurable value whilst avoiding overt commerce.<sup>132</sup> Disposal of human remains is unavoidable, uncomfortable and potentially expensive. Funerary payments could save inconvenience and expense for families while potentially sidestepping the mistrust many feel at seeing a loved one's body "purchased."<sup>133</sup>

The degree to which any proposal truly de-commodifies sales (or would be seen to do so) is uncertain. Such proposals avoid re-termining "donors" as "vendors"—though other forms of payment may not mandate a shift in language either.<sup>134</sup> Attempts to reframe paid donation as "rewarded gifting" (with monetarily-valued items as alternatives to direct payment) have been condemned as immoral, unethical and deceptive.<sup>135</sup> Potts still reluctantly endorses schemes such as funerary expense payments, but expresses discomfort with "blatant corruption of the language" in rendering controversial payments palatable.<sup>136</sup> Mahoney criticises the existing language of altruism as inaccurate in light of profit-making and commercial activities within the medical sector.<sup>137</sup> She recognises social utility in allowing market-type behaviour to continue whilst "maintaining the fiction that materials crucial to our sense of self are never assigned a price tag".<sup>138</sup> However, cognitive dissonance (such as denying that a stipend is a "payment" when only available for funeral costs) is hypocritical, dishonest, and dangerous for participants' capacity to critically monitor market conduct occurring.<sup>139</sup> This argument's weight depends on deeming the semiotics of organ sales important. Approaches such as Mahoney's have been criticised as blind to the non-economic dimensions of sale-interactions.<sup>140</sup> To moral opponents of commerce in human bodies, logical impurity might not undo the benefits of framing transactions as non-commercial.<sup>141</sup> While it does seem manifestly hypocritical to simply substitute in a less-direct form of payment than money while using it for the exact same purpose (enticing an exchange), the superficial distinction may nonetheless be politically and practically beneficial to a policy's successful enactment at little cost.<sup>142</sup>

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129 Schwindt and Vining, above n 5, at 495.

130 Edgar A Pessemier, Albert C Bemmaor and Dominique M Hanssens "Willingness to Supply Human Body Parts: Some Empirical Results" (1977) 4 *The Journal of Consumer Research* 131.

131 Schwindt and Vining, above n 5, at 495.

132 Satz, above n 3, at 273.

133 Hansmann, above n 3, at 62; and Satz, above n 3, at 273.

134 Veatch, above n 116, at 21.

135 At 22–23; and Potts, above n 12, at 230.

136 Potts, above n 12, at 230–231.

137 Mahoney, above n 32, at 206–210.

138 At 209. These criticisms remain live in Part IV.

139 At 206–210.

140 LD de Castro "Commodification and exploitation: arguments in favour of compensated organ donation" (2003) 29 *Journal of Medical Ethics* 142 at 144–145; Radin, above n 21, at 33; and Phillips, above n 17, at 21.

141 Radin, above n 21, at 103–106.

142 Crespi, above n 72, at 38. Author suggests that a decision between the two should be decided by whichever maximise donation results.

### (3) Purchasing agencies

Proposals vary as to structure and pricing. These details offer an opportunity to pre-empt various concerns. Hypothetical markets exist on a spectrum between fixed-price state monopsony and open capitalism. Economic literature rarely advocates for an entirely free market in organs—which is self-evidently problematic.<sup>143</sup> This article recommends a monopsonistic state purchasing agency which is both pragmatic and sensitive to potential ethical issues.

De-centralised systems have previously proven more efficient than centralised ones in procurement, but less efficient in distribution due to informational inadequacy.<sup>144</sup> Centralised state purchasing might have economy-of-scale advantages given New Zealand's small population, and avoid aspects of overt capitalism (which is desirable for Part IV's non-instrumental perspectives).<sup>145</sup>

Cohen recommends prices be generous enough to significantly increase the supply of organs without being prohibitively expensive or creating perverse incentives.<sup>146</sup> De Castro makes reference to awards given to “outstanding citizens for noteworthy accomplishments” and deceased soldiers' families as a possible guideline, were the analogy deemed symbolically desirable in affirming organ donation's righteous character.<sup>147</sup>

### (4) Ensuring delivery: hospitals as bailees

Recognising property rights in organs would lead to hospitals being treated as bailees from the time of death to the procurers taking custody; this is analogous to any other possession under a will.<sup>148</sup>

The potential for negligence claims would mandate adjustment to the new system; this would render doctors' sense of obligation to seek familial permission before retrieving organs financially unsustainable.<sup>149</sup> Taylor affirms that vesting property rights in residual claimants is probably the most potent mechanism for ensuring that retrievals occur pursuant to decedents' arrangements.<sup>150</sup> This seems particularly taxing to practitioners—it supplements existing anxiety over wrongfully dismembering a corpse with potential liability for not doing so.<sup>151</sup> The risk of excessive liability on hospitals could be mitigated by shifting duties to procurers once notified.<sup>152</sup> Cohen contends that preservation and retrieval of organs without consulting family would quickly become habitual, and justifies the initial discomfort as aligning doctors' financial interests with organ procurement and the will of decedents.<sup>153</sup> Furthermore, survivors will have little incentive to object to

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143 J Radcliffe-Richards and others “The case for allowing kidney sales” (1998) 351 *The Lancet* 1950 at 1950–1952.

144 Prottas, above n 86, at 184.

145 Schwindt and Vining, above n 5, at 489–490; and Charles T Carlstrom and Christy D Rollow “The Rationing of Transplantable Organs: A Troubled Lineup” (1997) 17 *Cato Journal* 163 at 175–176.

146 Cohen, above n 5, at 35 and 40–42. Cohen recommended US\$5,000 in 1989—a fixed domestic rate would require substantial policy analysis.

147 de Castro, above n 140, at 143.

148 Cohen, above n 5, at 34; and Crespi, above n 72, at 30.

149 Cohen, above n 5, at 34; and Crespi, above n 72, at 48.

150 Taylor, above n 44, at 92.

151 Cohen, above n 5, at 12.

152 Crespi, above n 72, at 48.

153 Cohen, above n 5, at 34.



retrievals where their relatives clearly consented, and they potentially stand to benefit from their estates' enrichment.<sup>154</sup> Economics literature is relatively silent as to possible psychological disutility in "patients" becoming "property", but affirms that property claims need not meaningfully alter the altruistic character of organ donations.<sup>155</sup>

#### *D Accommodating instrumental problems*

##### (1) Increasing transplant costs

It has been asserted that paying for organs would severely increase total transplant expenditures.<sup>156</sup> However, an increased organ supply would likely lower equilibrium prices, while facilitating efficiency-improving research.<sup>157</sup> Even if costs increase, they would be proportionate to the existing costs of each transplant, reduce hospital wait times and treatment costs, and increase productivity for patients whose lives are saved.<sup>158</sup>

Arguments that limited supplies of organs act as a "natural gatekeeper" limiting government expenditure on life-saving operations are similarly economically unsound and usually unjustifiable against the disutility of lives lost.<sup>159</sup>

##### (2) Moral hazards: murder and suicide

Over-incentivising potential donors could lead to murder or suicides in order to deliver windfalls to their estate. Cohen asserts that ensuring potential pay outs are small enough to serve as comparatively weak motivations for either hazard will avoid noticeable inducement.<sup>160</sup> Disallowing specific assignees, or provisions to void payment clauses may also mitigate moral hazard concerns.<sup>161</sup>

Finally, medical malfeasance and murder both occur in existing black markets. By bringing most organ exchanges into a regulated context and increasing organ supply, futures contracts could satisfy the demand currently fuelling criminal enterprises.<sup>162</sup>

##### (3) Losses to altruism

One altruism-focussed claim is that providing paid incentives would "crowd out" altruistic donation, potentially reducing the total amount of donations.<sup>163</sup> This is difficult to assess. Intuitively, providing an additional incentive without removing any should increase net donations.<sup>164</sup> Opponents contend that current donors may be offended by the option to

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154 Hansmann, above n 3, at 65.

155 At 71.

156 See, for example, Roger W Evans "Organ Procurement Expenditures and the Role of Financial Incentives" (1993) 269 *Journal of the American Medical Association* 3113 at 3117; and Munzer, above n 22, at 259–260.

157 Potts, above n 12, at 219; and Jensen, above n 31, at 579.

158 Clay and Block, above n 70, at 229–230.

159 Cohen, above n 5, at 38–40.

160 At 39–40; and Clay and Block, above n 70, at 230.

161 Crespi, above n 72, at 37; Cohen, above n 5, at 39; and Clay and Block, above n 70, at 230–233.

162 Clay and Block, above n 70, at 230–231.

163 Sells, above n 86, at 2199.

164 Potts, above n 12, at 217.

“sell” their organs, and withdraw consent.<sup>165</sup> This argument (derived from blood donation) may apply more sensibly to live donations, which are painful and potentially dangerous (so require substantial motivation).<sup>166</sup> Even if cadaveric purchases were to crowd out live kidney donations, given their wider applicability this might be an acceptable loss.<sup>167</sup> Despite economic claims being as-of-yet untested,<sup>168</sup> the “loss function” of the status quo (preserving consistently dissatisfactory donation rates) is high enough that empirically testing a market’s impact is worthwhile, particularly in New Zealand’s smaller population.<sup>169</sup>

A secondary concern is that financially-incentivised donors might provide lower quality organs than volunteers (being motivated by poverty, poor health, or addiction).<sup>170</sup> Payment following death circumvents this by preventing financially exigent contracting. Alternatively, modern medical screening can safeguard quality.<sup>171</sup>

Over the very-long term, cadaveric donation may evolve into the norm and thereby naturally overcoming the shortage.<sup>172</sup> While an ethic of routine donation could develop under paid or purely altruistic models, it is unclear which approach would enact such a paradigm shift more quickly.<sup>173</sup>

Broader arguments posit altruism itself as a normative good, facilitating public morality and social cohesion.<sup>174</sup> They see a fundamental difference in character between purely altruistic and compensated transfers—the former provides greater psychological utility to donors and families than the latter.<sup>175</sup> However, this difference does not prove that prohibiting payment serves altruism.<sup>176</sup> Moreover, under the status quo, familial pressure often requires live donors to bear costs single-handedly (due to a shortage of available organs) by donating uncompensated.<sup>177</sup>

#### (4) Distributional and exploitation concerns

As addressed above, live sales face myriad exploitation issues.<sup>178</sup> However, cadavers are not obviously exploitable, and given the disproportionate over-representation of minorities in organ failure statistics, an increase in transplants may achieve incidental distributive justice.<sup>179</sup>

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165 See Philippe Steiner “Gifts of Blood and Organs: the Market and ‘Fictitious’ Commodities” (2003) 44 *Revue française de sociologie* 147 at 151.

166 At 148.

167 Hansmann, above n 3, at 68.

168 RD Guttmann “Future Markets: Claims and Meanings” (1992) 24 *Transplantation Proceedings* 2203 at 2203.

169 Cohen, above n 68, at 33; and Potts, above n 12, at 213.

170 Hansmann, above n 3, at 69.

171 “Developments in the Law: Medical Technology and the Law” (1990) 103 *Harv L Rev* 1519 at 1625.

172 Sells, above n 86, at 2200; but see Hansmann, above n 3, at 71.

173 Hansmann, above n 3, at 71.

174 Mark F Anderson “The Future of Organ Transplantation: From Where Will the New Donors Come, To Whom Will Their Organs Go?” (1995) 5 *Health Matrix* 249 at 299.

175 Sells, above n 86, at 2199.

176 Gerald Dworkin “Markets and Morals: The Case for Organ Sales” in Gerald Dworkin (ed) *Morality, Harm, and the Law* (Westview Press, Boulder, 1994) 155 at 159; and Mahoney, above n 32, at 195–196.

177 Mahoney, above n 32, at 215–218.

178 Cohen, above n 5, at 2.

179 Mauri Ora, above n 79, at 22–24.

### E *Total efficiency*

Whilst not Pareto optimal, carefully-regulated property rights' life-saving potential is still normatively compelling in consequential terms.<sup>180</sup> For some people, the moral loss of allowing commerce cannot be overcome.<sup>181</sup> However, the utility to those reached by an increased organ supply is great enough to arguably ground a positive duty to reform the current *no property* principle, in spite of financial costs and disutility to those whose preference against compensation is unsatisfied.<sup>182</sup> Gradually, moral values may adjust to the proposal, further limiting moral discomfort's disutility.<sup>183</sup>

## IV Non-Instrumental Opposition to Organ Property Rights

The intractability of the *no property* rule is largely grounded in moral antipathy toward commodifying the human body. If organ property could be shown to violate a higher good than the utilitarian benefits it would facilitate, futures contracts would be normatively unjustified. This section examines the moral status of corpses, Kantian notions of respect and dignity, and broader concerns regarding the commodification of personhood.

### A *Why do corpses matter?*

The treatment of deceased human bodies can be morally important to society in several ways. The corpse remains a person's worldly embodiment for those they interacted with; it grounds an intrinsic sentimental value. Moreover, some religions attach spiritual importance to the sanctity of corpses as important in the afterlife. Humans are aware of the ways in which their corpse will be treated, and this knowledge may impact thoughts and actions while living. However, the most convincing argument for restrictions around corpses, even where freely consented to whilst living, is the potential for the treatment of corpses to affect the living world.

Phillips defends corpses' cultural "special-ness" by emphasising that "we all have bodies".<sup>184</sup> She identifies bodies as tangible signifiers of shared vulnerability and constant reminders of "the common experience of living as embodied beings in the same world."<sup>185</sup> If viewing others as equals is "bound up" in one's capacity to empathically identify along bodily lines, cultural protection of the body indirectly protects equality.<sup>186</sup> Allowing invasions into current bodily sanctity risks diminishing protective norms where living bodies are implicated analogously to objects or commodities (as in manual labour, surrogacy, and prostitution).<sup>187</sup>

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180 Crespi, above n 72, at 49.

181 At 49–55.

182 Hansmann, above n 3, at 70.

183 At 70.

184 Phillips, above n 17, at 10–11.

185 At 11.

186 Lynn Hunt *Inventing Human Rights: A History* (WW Norton & Company, New York, 2007) at 26–33; and Phillips, above n 17, at 38. Hunt argues that rights of bodily integrity and prohibitions on torture began with the recognition that individuals consider their own bodies important and feel pain similarly to others in society—grounding universal bodily autonomy as a recognised public good.

187 Phillips, above n 17, at 4 and 11–12. This is not to say that these areas invariably treat bodies as commodities themselves, only that similar concerns are implicated.

### B *Kantian objections based in human dignity*

This section will focus on the relationship between organs and Kant's conception of dignity. The second formulation of Kant's categorical imperative requires that individuals treat "humanity" as an "end in itself" and not merely as a "means to an end".<sup>188</sup> Humanity's status as an "end" (henceforth encapsulated by the term "human dignity") stems from its inherent capacity for free will and objective moral reasoning; this allows for moral engagement with the world distinct from non-rational life forms.<sup>189</sup> When universalised, treatment of others as purely "means" (disregarding their dignity) would have the effect of denying the subjectivity and agency of all within society, thereby undercutting core principles of an equal, democratic society.

One might also degrade one's own dignity, through self-objectification.<sup>190</sup> Kant gives the now-anachronistic example of rendering oneself a sexual object for the pleasure of another, which may be agency-threatening by yielding the right to unqualifiedly demand the respect of others as a human qua rational agent.<sup>191</sup> Self-degradation may further be intrinsically harmful because it undermines self-respect. The Kantian definition of self-respect is internal moral worth derived from adherence to moral law, or one's own moral standards; this may be a precondition for considering external moral questions and duties.<sup>192</sup>

#### (1) Kantian objections to organ sales generally

From a Kantian perspective, organ sales will be problematic if they deny individuals' humanity by treating them purely as means. Organs are physically constitutive of dignity-possessing persons.<sup>193</sup> However, it is unclear whether dignity extends to humans' individual organs—particularly post-mortem.<sup>194</sup> Concern might be assessed by placing organs on a gradient, with those more essentially "integrated" into the person being more likely to suffer degradations of dignity.<sup>195</sup> Alternately, organs may derive dignity from their role in constituting the person.<sup>196</sup> Under such a view, dignity can be determined contextually: sufficiently dignified reasons for commodifying one's organ might be inoffensive, as might sufficiently dignified uses of organs.<sup>197</sup>

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188 Immanuel Kant *Grounding for the Metaphysics of Morals* (translated ed: James Ellington (translator) *Grounding for the Metaphysics of Morals* (Hackett, Indianapolis, 1993) at 36.

189 Kant as cited in Munzer, above n 22, at 267; and Robert S Taylor "A Kantian Defense of Self-Ownership" (2004) 12 *The Journal of Political Philosophy* 65 at 75. *Objective* here takes on additional meaning, as not only impartiality but an analytic distinction between individuals as *subjects* and the objective reality they move through.

190 Immanuel Kant *Lectures on Ethics* (translated ed: Peter Heath (translator) *Lectures on Ethics* (Cambridge University Press, Indianapolis, 1997).

191 Stephen R Munzer "Kant and Property Rights in Body Parts" (1993) 6 *CJLJ* 319 at 322–326.

192 Kant, above n 190, at 116–126; and Munzer, above n 191, at 323 and 329.

193 Munzer, above n 191, at 323. Theoretical opposition to living organ sales often focusses on the liminal space between bodily subjects and objects. See Radin, above n 21; Phillips above n 17; and Munzer, above n 22.

194 Munzer, above n 22, at 275. This gradient assists sweeping distinctions between external body products (such as hair) and core organs. The impact that death will have on a part's placement is, therefore, uncertain, given they remain core, internal organs, but are no longer essential to human life or moral agency.

195 At 275.

196 At 276.

197 At 274–276.

Munzer frames three Kantian possible objections to organ commerce:<sup>198</sup>

- (1) That it is morally objectionable to sell body parts if they offend dignity by doing so for an insufficiently strong reason;
- (2) That second-and-third-party participation in such sales will be morally objectionable where it offends dignity; and
- (3) That it is morally objectionable for a market to exist if its workings offend the human dignity either of multiple individuals, or of society generally.

Whether dignity is degraded must be determined by analysing the exchanges for whether recognition of dignity is displaced by assessments of commodified market value.<sup>199</sup> Individual transactions risk participants behaving exploitatively, and widespread markets could undermine dignity more broadly, shifting individuals' reciprocal recognitions of moral agency into fixation on themselves and others as repositories of valuable commodities.<sup>200</sup>

## (2) Kantian analysis of futures markets

Whether entering a futures contract is self-objectifying is unclear. Body parts are removed for a good purpose: to save lives.<sup>201</sup> When payment is to an estate, this moral good will remain a primary motivator. Whether individuals experience their body's objectification is unclear. Removal and transfer of body parts occurs after death which prevents the living agent from consciously experiencing objectification.<sup>202</sup> Corpses are not rational agents and, therefore, incapable of losing agency. However, contracting whilst alive requires regarding one's organs as potentially market-alienable property.<sup>203</sup> Ultimately the details of procurement will be determinative of whether human dignity is breached; that is, whether ethical rules and restrictions to ensure the dignity of the living contractors are respected.<sup>204</sup>

## (3) An alternate conception: control self-ownership

Another Kantian argument is that personal and moral autonomy ground managerial self-ownership rights of use, exclusion and immunity from expropriation.<sup>205</sup> Coercive limitations on these rights cannot be justified except through third-party externalities.<sup>206</sup> Escheatage, therefore, abrogates individuals' autonomy by presumptively vesting their rights in the state.<sup>207</sup> Similar abrogation occurs where voluntary dispositions for one's organs (including alienation for compensation) are prohibited.<sup>208</sup> While self-ownership rights do not positively ground a duty to go beyond decriminalising sales, facilitating the

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198 At 283–285.

199 Michael Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (Martin Robertson, Oxford, 1983). See chapter 4: Money and Commodities.

200 Munzer, above n 22, at 268–269; and Phillips, above n 17, at 138–143.

201 Munzer, above n 191, at 339.

202 At 339–340.

203 At 339.

204 Munzer, above n 22, at 278.

205 Taylor, above n 189, at 66–69.

206 Kant, above n 190, at 125–127.

207 Taylor, above n 44, at 94–95.

208 At 94–95.

mutual satisfaction of preferences by freely contracting parties could arguably justify full legalisation.<sup>209</sup>

#### (4) Dignifying patients: a utilitarian response

Kantian objections seem to value the dignity of the dead or dying over the lives (and dignity) of patients on waitlists.<sup>210</sup> Practically and intuitively, tenuous Kantian opposition seems unconvincing against the opportunity cost of potential lives lost.

#### C Does commodifying the organs of the dead threaten the personhood of the living?

A broader fear, with both consequential and deontological implications, is that treating bodies as property commodifies persons. Radin defines commodification as:<sup>211</sup>

... a particular social construction of things people value ... the social process by which something comes to be apprehended as a commodity, as well as to the state of affairs once the process has taken place.

Particularly salient is the concern that normalising the application of property concepts to human bodies risks eroding current norms protecting bodily sanctity and significance. Commodification therefore facilitates the dehumanisation and exploitation of vulnerable parties whose bodies and bodily labour are involved in market activity.<sup>212</sup>

#### (1) Commodification's effects

Commodified citizens may come to conceptualise their bodies not as intrinsic parts of the self, but as property owned by that self, fundamentally shifting their notions of personhood,<sup>213</sup> and alienating them from physical experiences.<sup>214</sup> A value shift towards commodification may overemphasise the economic dimensions of socio-political issues, to the detriment of other principles (such as human rights).<sup>215</sup> Attempts to commensurate distinctly non-monetary values (such as bodily health and integrity) with market values may be inaccurate, debasing, or damaging to personhood and its perception.<sup>216</sup> Even absent proof of humanity's incommensurable value, merely attempting commensuration (by forcing head-on value comparisons) may warp thinking patterns around personhood.<sup>217</sup>

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209 At 96–97.

210 de Castro, above n 140, at 145; and Clay and Block, above n 70, at 230. Level this argument against *commodification* concerns.

211 Radin, above n 21, at xi.

212 At 84.

213 Phillips, above n 17, at 109–114.

214 Radin, above n 21, at 81–84.

215 At 86. For instance, Radin condemns various attempts to frame rape as a sexual *market failure* as harmful in their equation of rapists' preferences with victims' bodily autonomy.

216 Radin, above n 21, at 9 and 84–87; Munzer, above n 22, at 283; and Phillips, above n 17, at 37.

217 Linda Radzik and David Schmidtz "Contested Commodity" (1997) 16 Law and Philosophy 603 at 609–611.

## (2) Commodification in the proposed model

Arguments that market valuation will replace other worldviews rely upon the seemingly-unsubstantiated assumption that commodification's introduction will inexorably lead towards universal commodification. This implies that commodification is a natural and inevitable process, displacing other value-metrics and replacing them with only itself.<sup>218</sup> However, public psychology will likely adjust to marginally commodifying cadaveric procurement as routine and desirable without upsetting core senses of personhood for the living.<sup>219</sup>

Moreover, commodification objections diminish humans' sensitivities to coexisting values in exchanges and the ability to import personal meaning into transactions.<sup>220</sup> Radin recognises potential for "incomplete commodification" wherein efficient market concepts are introduced without destroying existing norms and dynamics.<sup>221</sup> She even rejects attempts to completely non-commodify specific items (such as blood donation) as encouraging an artificial binary which would concede needless ground by categorising partially-commodified items as totally commodified.<sup>222</sup> Moreover, distaste for market language may prevent recognition of existing commodification-type dynamics, such as the profitability of transplantation for medical professionals.<sup>223</sup>

A shift in emphasis from market aspects to nonmarket paradigms—here, regulating against privatisation and preserving the language of altruism—will ensure that commodification remains incomplete.<sup>224</sup> Welcoming private purchasing agencies would expose living donors to aggressive solicitation, and corpses to potentially callous business practices such as earnings projections, speculative investment and reporting in financial news.<sup>225</sup> Such overt profit-driven behaviour could erode the aged notion of bodily sanctity, and degrade the perception of organ donors.<sup>226</sup> Restricting purchases to a state agency with established regulations and goals beyond a profit motive will likely protect organ donors from being dehumanised, avoid inadvertently publicising a financially predatory attitude towards organ procurement and protect distinction between the bodies of the deceased and living.

## (3) Tension between commodification and Kantian approaches: indirect compensation

To a party concerned with market rhetoric, superficially non-commodifying gestures—such as "rewarding" donors' altruism with funerary stipends, instead of monetarily incentivising donation directly—desirably offsets the influence of payment on social perception of donation.<sup>227</sup> However, implying that society is not using economic principles to increase organ supply could be seen as disrespecting contractors' status as rational autonomous agents by misrepresenting purchaser motivations, and denying the

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218 Radin, above n 21, at 95; Radzik and Schmidtz, above n 217, at 608; and Mahoney, above n 32, at 209.

219 Hansmann, above n 3, at 77.

220 de Castro, above n 140; Radin, above n 21, at 104; and Cohen, above n 68, at 35.

221 Radin, above n 21, at 106–107.

222 At 107.

223 Mahoney, above n 32, at 208–210.

224 Radin, above n 21, at 116–117.

225 Munzer, above n 22, at 278.

226 At 277–278.

227 Hansmann, above n 3, at 62.

opportunity to informedly consent.<sup>228</sup> Financial payments to one's estate are still indirectly compensatory enough to be comparatively non-commodifying, avoid direct purchases of organs by individuals, and honestly represent the transaction occurring. This approach attractively balances Kantian, commodification, and utilitarian concerns.

#### (4) Concluding commodification

Questions as to how norms and psychology would internalise cadaveric property rights in the long-term are essentially empirical in nature and warrant careful exploration. New Zealand's small size and one-time reputation as a "social laboratory" suggests that experiments with commodification could be tolerated here without fundamentally destabilising domestic or international norms.<sup>229</sup>

Allowing property rights in one's own cadaveric organs may alter conception of those organs and death. Current cadaveric donation suggests that in itself, organ retrieval does not seriously damage respect for bodily rights. State-operated futures contracts will likely not be visibly commodifying enough to undercut respect for humanity or personhood, and prohibiting free markets minimises 'slippery slope' risks.

## V Conclusion

Though its normative ambitions of protecting the human body are admirable, the legal fixation on the *no property in the body* rule is excessive. A law and economics analysis clearly articulates the utility in allowing a limited expansion of property rights in organs as the basis for a cadaveric futures market. A state monopsony could effectively procure organs for life-saving transplants currently rendered impossible by a lack of active incentives to counterbalance institutional barriers to donation. Through careful, considered regulation, such a market could ably navigate deontological concerns around Kantian dignity, and the threats posed by commodification of personhood.

This solution is not without its flaws—futures markets have never been empirically tested and may prove ineffective or involve unpredicted risks. Certain issues, such as familial obstruction of procurement, may retain some measure of force. Further, as technology continues to develop the finality of brain-death may change, and alternative developments in reductive treatments may render human transplantation redundant.<sup>230</sup> Nonetheless, a limited property right in cadaveric organs, restricted to alienation following death, may help ameliorate the present problem of transplant organ shortage without serious risk.

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228 Taylor, above n 189, at 70–75.

229 Jock Phillips "Visitors' opinions about New Zealand—'Social laboratory of the world', 1890–1920" (20 June 2012) Te Ara Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.

230 Garwood-Gowers, above n 1, at 30–32.